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Cover Page Footnote

The author's thoughts about on-line dispute resolution were influenced by her membership on the ABA Task Force on E-commerce and ADR, established in Fall 2000 by five sections of the ABA. The Task Force Reporter is Professor Anita Ramasastry of the University of Washington School of Law and Associate Director of the Center for Law, Commerce and Technology, who is aided by Assistant Reporter Ben Davis of Texas Wesleyan University School of Law. The Task Force presented a Preliminary Report and Concept Paper on May 21, 2001 and will present its report in Winter 2002. For more information on the Task Force, see Center for Law, Commerce and Technology, at <http://www.law.washington.edu/ABA-eADR>. The author was also influenced by her work in 2000 as a Visiting Scholar at the United Nations Commission on International Trade Law ("UNCITRAL"). The author was also affected by the many extensive disclaimers appearing on legal websites in which the owner of the site disclaimed any attempt to provide any legal advice and disavowed any liability for anything. In the spirit of these disclaimers, the author does not purport to provide an extensive or exhaustive study of electronic commerce, domain names, or web-based legal services, but rather to provide sufficient background to explore the possibility of on-line dispute resolution as a mechanism for resolving legal controversies efficiently and inexpensively-and to address mechanisms to control the quality of the services provided.

PROVIDING LEGAL SERVICES FOR THE MIDDLE CLASS IN CYBERSPACE: THE PROMISE AND CHALLENGE OF ON-LINE DISPUTE RESOLUTION

*Louise Ellen Teitz**

INTRODUCTION

Ten years ago, the idea of obtaining advice about legal issues and possible means of redress suggested to most people the idea of consulting a lawyer. This process generally involved locating a lawyer, arranging an appointment within normal working hours, and getting over the initial hurdle of incurring considerable expense for legal help. The advent of the Internet and its increasing acceptance by the general population have furnished fertile ground for the development of technology to help provide on-line legal services. At the same time, as more and more activities are conducted on-line, the concept of “legal services” has expanded from what was traditionally viewed as equivalent to “practicing law” to incorporate a broad scope of activities available through a spectrum of providers, not just lawyers. These activities encompass a range of alternative dispute resolution mechanisms¹—from the simple complaint system² to mediation³ to

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1. This change is reflected in the Ethics 2000 proposal of a new rule, Rule 2.4, to

arbitration—fostered initially off-line by courts struggling to control unmanageable dockets and seeking to reduce costs and delay.⁴ The Internet merely accelerated the acceptance of alternative dispute resolution while making it available to the masses “twenty-four/seven,” whenever and wherever legal services are needed. Now you need not wait until Monday morning to call the insurance company to try to settle a dispute or to call a lawyer to help negotiate a settlement—just a click on the Internet actually provides potential resolution at several sites. Sometimes this help comes from high automation websites,⁵ ones with little or no human intervention in the settlement process, which instead utilize a computer program that matches settlement offers from each side.

address the lawyer serving as third-party neutral, since “[a]lternative dispute resolution has become a substantial part of the civil justice system.” ABA Ethics 2000 Comm’n, Comm’n on Evaluation of the Rules of Prof’l Conduct, Report with Recommendations to the House of Delegates, R. 2.4 cmt. 1 (Proposed Rule August 2001), at http://www.abanet.org/cpr/e2k-report_home.html [hereinafter Ethics 2000 Commission].

2. See, e.g., Council of Better Business Bureaus, Inc. & BBBOnline, White Paper, Protecting Consumers in Cross-Border Transactions: A Comprehensive Model for Alternative Dispute Resolution (2000), <http://www.bbbonline.org/about/press/WhitePaper.doc>. The website has a specific section allowing one to “File a Complaint.” <http://bbbonline.org> (last visited Oct. 24, 2001). Another website for filing “e-commerce cross-border complaints” is <http://www.econsumer.gov>, a site which is a joint project of the International Marketing Supervision Network and the Consumer Sentinel and maintained by the FTC. The site provides for complaints to be filed in multiple languages.

3. The increasing acceptance of mediation is illustrated by developments both in the U.S. and internationally. In the United States, the National Conference of Commissioners On Uniform State Laws approved and recommended the Uniform Mediation Act in August 2001. Uniform Mediation Act (2001), available at http://www.nccusl.org/nccusl/Annual_Meeting_2001/MED01AM.pdf. In the international arena, UNCITRAL has been working on model legislative provisions on conciliation. See Report of the Working Group on Arbitration on the Work of its Thirty-Fourth Session, U.N. Doc. A/CN.9/487 (2001), <http://www.uncitral.org/en-index.htm> [hereinafter Report of Working Group].

4. The Civil Justice Reform Act of 1990 (“CJRA”) required all federal district courts to develop plans for reducing costs and delay and recommended ADR as one of six case management principles. 28 U.S.C. §§ 471-82 (1994). As a result, most district courts provided for some form of ADR. For a review of the different plans in the federal courts, see Elizabeth Plapinger & Donna Stienstra, Federal Judicial Center & CPR Institute for Dispute Resolution, ADR and Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers (1996), <http://www.ftc.gov/ALTDISRES/adrsouce/adrblurb.html>. The RAND Institute for Civil Justice also produced several studies on ADR and the courts, including one on mediation under the CJRA plans. See James S. Kakalik, RAND Institute for Civil Justice, An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act (1996). U.S. District Courts are required to offer litigants in civil cases alternative dispute mechanisms to resolve their conflicts. 28 U.S.C. §§ 651-58 (1994).

5. See, e.g., <http://www.clicknsettle.com> (last visited Oct. 24, 2001); <http://www.cybersettle.com> (last visited Oct. 24, 2001); <http://www.settleonline.com> (last visited Oct. 24, 2001); see *infra* Part I.B.1.

As our concept of who or what provides “legal services” has changed,⁶ technology and the Internet have also led to a redefining of what constitutes “legal services” once unbundled from a lawyer as sole source.⁷ Even when those services are provided by someone trained and licensed as a lawyer, that person may not be acting as a legal professional.⁸ Indeed, this cross-over in the role from lawyer in the practice of law to lawyer as resource for dispute resolution services has helped open the market to the ordinary middle-class citizen/consumer. The advent of relatively inexpensive and quick dispute resolution services has also forced regulators globally to rethink how to establish and enforce standards for these new types of legal services.⁹

The promise of technology has challenged traditional legal ethics to respond with appropriate controls and standards. Legal ethics regulators and experts have struggled in the last several years to

6. See Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 *Geo. J. Legal Ethics* 209 (1990).

7. Even the American Bar Association has recognized the significance of “elawyring.” The ABA maintains a website that provides guidance for lawyers that practice on-line. See <http://www.elawyring.org>. “The distinction between legal ‘information’ and legal ‘advice’ is of critical importance as lawyers move their practices online.” Legal Information vs. Legal Advice, <http://www.elawyring.org/ethics/advice.asp> (last visited Oct. 24, 2001). Under “Legal Websites Best Practice Guidelines,” the ABA suggests that the site define “the difference between legal information and legal advice and a warning to the user that the site does not constitute legal advice and is not a substitute for the professional judgment of an attorney.” Elawyring Taskforce, ABA, Legal Websites Best Practice Guidelines (2001), <http://www.elawyring.org/tools/practices.asp> [hereinafter Legal Websites Guidelines]. Laypersons may not recognize any distinction in kind among the terms “legal services,” “legal information,” and “legal advice.”

Lawyers, like yourselves, are exploring this new Internet landscape. They [sic] not just advertising but finding new techniques to deliver legal services on-line. They are using client intakes [sic] forms or document drafting systems that the client [sic] fill out and the lawyer [sic] add value. They have found way [sic] to use e-mail, discussion forums and even private “chat” or “deal” rooms to keep their clients informed and well advised, at significantly lower costs than traditional service models. These lawyers have the vision to see a wholly new market of un-met legal needs.

Elawyring Basics, <http://www.elawyring.org/what/basics.asp> (last visited Nov. 1, 2001).

8. See ABA Ethics 2000 Commission, *supra* note 1.

[2] The role of a third-party neutral is not unique to lawyers In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

ABA Ethics 2000 Commission, *supra* note 1, R.2.4 cmt. 2 (Proposed Rule).

9. See *infra* at notes 79-86 and accompanying text.

define what is the "practice of law," when engaged in cyberspace.¹⁰ For example, is an electronic bulletin board or chatroom the practice of law? If so, in what jurisdiction(s) does it take place? Is a lawyer-client relationship established so as to create duties of competence, confidentiality, fiduciary duties, and, as important, potential liability for malpractice or fiduciary breach? The Ethics Opinions on this new problem are mounting as disciplinary boards struggle to apply traditional rules to new technology.¹¹ Can providing computer programs¹² to create legal documents or offering legal forms for downloading¹³ constitute the practice of law with the attendant ethical responsibilities? While "legal services," "legal advice," and "legal help" are not synonymous with the "practice of law," the uncertain boundaries created in a tangible world are merely shadows in the virtual world.¹⁴

Equally uncertain is the scope of what constitutes solicitation and what kinds of regulations are appropriate for advertising on the Internet. State ethics codes vary on the type and extent of permissible advertising.¹⁵ The related issue of multidisciplinary practice¹⁶ also

10. See generally Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 Duke L.J. 147 (1999); Richard Zorza, *Re-Conceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*, 67 Fordham L. Rev. 2659 (1999); Katy Ellen Deady, Note, *Cyberadvice: The Ethical Implications of Giving Professional Advice over the Internet*, 14 Geo. J. Legal Ethics 891 (2001).

11. For Bar opinions relating to chatrooms and issues of solicitation, see Ill. State Bar Ass'n Op. No. 96-10 (1997); Mich. Prof'l Jud. Ethics Op. RI-276 (1996); Utah State Bar Ethics Advisory Op. Comm. Op. No. 97-10 (1997).

12. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. CIV.A.3.97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999) (distributing software, Quicken Family Lawyer, was a violation of unauthorized practice of law), vacated by 179 F.3d 956 (5th Cir. 1999). See generally Julee C. Fischer, Note, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 Ind. L. Rev. 121, 130-34 (2000).

13. For example, the Maine State Bar Association provides forms for several court actions, including divorce and child support. See <http://www.mainebar.org/pages/forms.html> (last visited Oct. 24, 2001); see also <http://www.nolo.com> (last visited Oct. 24, 2001); <http://www2.desktoplawyer.co.uk/dt/browse/law/> (last visited Oct. 24, 2001).

14. Another related issue is the effectiveness of disclaimers by lawyers on the creation of a lawyer-client relationship or of any ethical responsibilities. Many of these disclaimers seek to avoid any potential liability under contract law. The websites of many law firms, bar associations, and consumer self-help services contain extensive disclaimers. See *supra* note 7. The Legal Websites Best Practice Guidelines provide two examples of disclaimers, both of which focus on the need to consult a lawyer "if you want professional assurance that our information, and your interpretation of it, is appropriate to your particular situation." Legal Websites Guidelines, *supra* note 7 (quoting <http://www.nolo.com>).

15. See Ariz. Ethics Op. 99-06 (1999); Mass. Ethics Op. 98-2 (1998); N.Y.C. Ethics Op. 1998-2 (1998); Ohio Supreme Court Ethics Op. 99-3 (1999). See generally Louise L. Hill, *Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards*, 75 Wash. L. Rev. 785 (2000).

16. Model Rules of Prof'l Conduct R. 5.4 (1998). Multidisciplinary practice has

rears its head in cyberspace. Issues of referral fees and sharing fees with non-lawyers are present when lawyers participate in companies providing legal services on the Internet.¹⁷ As with the regulation of unauthorized practice by lawyers, this problem, too, raises the issue of jurisdiction to prescribe.¹⁸

Many of these ethical dilemmas, especially the question of jurisdictional limits, are not new. Indeed, they have increased even without the technology as the realities of national and international legal practice clashed with the traditional licensing and regulation along individual state borders.¹⁹ The legal profession has avoided concrete answers to the conflicts of law created by jurisdictional limits, as reflected in refusals to establish adequate rules to govern this burgeoning problem.²⁰ Indeed, it is the failure to tackle the new

been very controversial. The ABA House of Delegates reaffirmed its policy against multidisciplinary practice in July 2000. The Commission on Multidisciplinary Practice produced a final report. See ABA Commission on Multidisciplinary Practice, Report to the House of Delegates (2000), <http://www.abanet.org/cpr/mdpfinalrep2000.html>. The ABA has also compiled a survey of the status of state regulation of multidisciplinary practice as of October 12, 2001. See MDP Information, at http://www.abanet.org/cpr/mdp_state_summ.html (last visited Oct. 24, 2001). For additional information, see ABANetwork Center for Professional Responsibility, at <http://www.abanet.org/cpr/multicom.html> (last visited Oct. 24, 2001). See generally Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services From Lawyers in a Multidisciplinary Partnership*, 13 *Geo. J. Legal Ethics* 217 (2000); John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *Fordham L. Rev.* 83 (2000).

17. See, e.g., Arizona Ethics Op. 99-06 (1999); Ohio Supreme Court Ethics Op. 99-93 (1999).

18. Prescriptive jurisdiction refers to the ability of a sovereign to prescribe substantive laws or legislative rules and is also called "legislative jurisdiction." Prescriptive jurisdiction controls the extraterritorial application of law by a sovereign or the application of mandatory laws. It then overlaps with "choice of law." One obvious example of prescriptive jurisdiction and extraterritorial application of law is in the context of U.S. antitrust laws, which have spawned significant controversy, especially when applied to conduct that takes place, in part or in whole, outside the sovereign's territory. The extraterritorial aspect is further complicated when considering regulation of cyberspace since there is no uniformity in defining what constitutes a sovereign's "territory" in connection with transactions occurring in whole or in part in cyberspace and by electronic means. See *infra* note 107.

19. The ABA Commission on Multijurisdictional Practice is currently studying these issues and has held hearings. Information on the hearings, a bibliography of sources, and surveys of current practice are available at <http://www.abanet.org/cpr/mjp-home.html> (last visited Oct. 24, 2001). The Ethics 2000 Commission has recommended revisions to Rule 5.5 to clarify what is unauthorized practice in both litigation and counseling contexts and choice of law in connection with disciplinary authority Rule 8.5. Ethics 2000 Commission, *supra* note 1, R. 5.5, 8.5 (Proposed Rules).

20. In discussing the issue in the context of unauthorized practice, the ABA's elawyering site states: "E-mail messages and web discussions raise questions about whether and when a lawyer is giving advice in another jurisdiction (where she is not licensed). As the interactivity and sophistication of legal websites increases, lawyers will increasingly find themselves at risk of prosecution." Ethical Issues: Summary, at <http://www.elawyering.org/ethics/ethics.asp> (last visited Oct. 24, 2001).

crossborder frontier that demonstrates the need for a layer of regulation apart from and outside of traditional regulation of lawyers, especially within the context of the unauthorized practice of law. The implications of these traditional problems of legal ethics have expanded exponentially as more and more transactions occur on-line in the borderless realm of cyberspace.

But what is different about providing “legal services” on-line as opposed to off-line that suggests the need for new and/or different regimes of regulation?²¹ Has the incorporeal nature of the medium transformed the rhetoric? The promise of inexpensive legal services to the masses, especially the previously excluded middle class, has created a market for on-line legal services. With minimal overhead costs and a potential global audience, on-line legal services can reach more people with more varied needs than the average solo practitioner could hope to accomplish through off-line services. But with this promise and the anonymity of cyberspace comes the potential for abuse and the need for some form of regulation as well as for the creation of new standards to meet the new market. Anyone can hang a shingle in cyberspace and claim to provide on-line legal services, as evidenced by the case of one site where the “lawyer” was a fifteen year old student.²² Yet the multijurisdictional nature of the market inhibits regulations and standards that are acceptable to the participants. The international component of on-line legal services makes consensus even more difficult.²³ The traditional view of law practiced only by lawyers and regulated by lawyers and along state lines may not work in the twenty-first century when legal services are provided by non-lawyers in a borderless world.²⁴

I. ON-LINE DISPUTE RESOLUTION (“ODR”) FOR THE MIDDLE CLASS

The smaller realm of on-line dispute resolution²⁵ offers a glimpse at the scope of the new problems and perhaps some guidance for other

21. See Zorza, *supra* note 10, at 2663-67 & nn. 14-16 & 19 (discussing the impact of technology on different ethical duties and categorizing different innovative deliveries of legal services, including the “brief service and advice”).

22. The New York Times Magazine reported that a fifteen-year old boy had become the leading legal expert on the website Askme.com, answering hundreds of legal questions daily. The student had listed himself as someone who was legally trained and an adult. Michael Lewis, *Faking It*, N.Y. Times, July 15, 2001, at 32 (Magazine).

23. See *infra* notes 32-36 and accompanying text.

24. As the ABA Standing Committee on Delivery of Legal Services has said: Laypersons are usually not aware that only an attorney who is a member of a bar can provide legal advice and the attorney can only provide legal advice about the law in the state in which he is barred. Users may believe that a “chat” with an attorney is the equivalent of receiving legal advice.

Legal Websites Guidelines, *supra* note 7.

25. One way to view ODR is as a concentric circle within on-line legal services or

areas as well.²⁶ Even the name, on-line dispute resolution, or the easier but less aesthetic acronym, ODR, creates definitional and jurisdictional issues. On-line dispute resolution may describe dispute resolution that occurs in whole or part on-line.²⁷ It encompasses both disputes that arise off-line, in the real world, but are handled on-line and those that arise in cyberspace. In the former, traditional forms of out-of-court dispute resolution are adapted to utilize to some extent electronic means. Examples of this form of on-line dispute resolution would include arbitration that occurs in part by use of electronic means of communications²⁸ or at the other end of the spectrum, negotiation by means of high automation programs. These basically consist of software that match demand/settlement responses without human intervention.²⁹ The focus in this type of ODR is on the mechanisms and means used to resolve the dispute without reference to the source of the dispute. The dispute being resolved could be generated by a property or tort claim and have no relationship to electronic commerce. In the second category, on-line dispute resolution of on-line generated disputes, the focus is on ways to resolve disputes that result from transactions, such as purchases of goods or services, that have occurred in electronic commerce and may or may not be delivered on-line. In this category the focus is on the source of the dispute, rather than on the means used to resolve it.³⁰ These two categories, on-line handled and on-line generated, as a practical matter overlap at several places, especially when both the source of the dispute and the dispute resolution mechanism involve

web-based legal services but sometimes it can be used interchangeably in light of the broader definition of what constitutes dispute resolution. Both circles share problems of maintaining quality and ethical standards. This article focuses on the smaller area of ODR and does not address in detail some of the other areas that also offer promise for middle-class lawyering, such as the "self-help" sites and gel referral sites.

26. See generally Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 *Buff. L. Rev.* 975 (1997); M. Scott Donahey, *Dispute Resolution in Cyberspace*, *J. Int'l Arb.*, Dec. 1998, at 127; M. Scott Donahey, *Current Developments in Online Dispute Resolution*, *J. Int'l Arb.*, Dec. 1999, at 115; Veijo Heiskanen, *Dispute Resolution in International Electronic Commerce*, *J. Int'l Arb.*, Nov. 1999, at 29; Michael E. Schneider & Christopher Kuner, *Dispute Resolution in International Electronic Commerce*, *J. Int'l Arb.*, Nov. 1997, at 3.

27. While there is no agreement as to what percentage of the dispute resolution must take place on-line, most agree that sending an e-mail instead of a fax to a client does not convert the service into ODR.

28. The Inter-Pacific Bar Association ("IPBA") is in the process of establishing a CyberArbitration center. See *infra* Part I.B.1.

29. The best known examples of the high automation form are: clicknsettle, cybersettle, and settleon-line. See *infra* notes 67-69 and accompanying text.

30. The dispute resolution may occur off-line, such as with traditional court or out-of-court means. This article will not focus on the category of disputes that are generated by on-line activity but handled off-line. These could include disputes in connection with defamation actions on the Internet, claims connected with the delivery of goods or services on-line, or actions arising out of electronic contracting.

electronic commerce, such as domain name disputes that are handled on-line.³¹

Both types of ODR, on-line and off-line generated, raise problems of jurisdiction, choice of law, and enforcement. Both create issues of scope and definition. Both require a determination whether consumer transactions are included and what role mandatory law plays. Both raise practical problems such as handling electronic documents, ensuring authenticity, and providing confidentiality. Thus, many of the concerns raised in connection with on-line dispute resolution are also applicable to dispute resolution generated by on-line activities. ODR itself becomes electronic commerce since it is a service occurring in cyberspace.

The regulation of ODR as part of e-commerce has spawned extensive debates, both domestically and internationally, about self-regulation as opposed to governmental intervention, as well as about jurisdictional authority.³² Embroiled in the debate is the role of the "consumer," who in the context of ODR is also the "client." For example, in the area of consumer transactions, the approaches taken by different countries reflect underlying differences in philosophy and the role that government should play in controlling transactions in electronic commerce. The current attitudes in the United States and in the European Union toward electronic commerce illustrate these contrasts. The EU provides more protection for consumers, not merely as to truthful advertising (as in U.S.), but also as to the right to be sued in the country of one's residence and right to access to courts.³³ The rights accorded consumers in electronic commerce must not be less than those in traditional non-electronic transactions.³⁴ The

31. See *infra* Part I.D.

32. The efforts of The Hague Conference on Private International Law to negotiate an international convention for the enforcement of foreign judgments illustrates the increasing role that e-commerce has played, especially in connection with issues of jurisdiction. See Hague Conference on Private International Law, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Interim Text (2001), <http://www.hcch.net/e/workprog/jdgm.html>. The website also contains several studies of e-commerce and jurisdiction undertaken by the Hague Conference in connection with the negotiations. "Around the time the treaty writers sat down to work, the e-commerce sector took off. Suddenly, they found themselves trying to set global rules on how to regulate a new form of commerce that hardly recognized borders." Paul Hofheinz, *Global Treaty On E-Commerce Faces Hurdles*, Wall St. J., Aug. 16, 2001, at A11.

33. See, e.g., Council Regulation 44/2001 of 22 December 2000 on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12), <http://europa.eu.int/scadplus/leg/en/lvb/133054.htm> (entering into force on March 1, 2002).

34. See, e.g., Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19, http://europa.eu.int/eur-lex/en/lif/dat/1997/en_397/0007.html; Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on the Sale of Consumer Goods and Associated Guarantees, 1999 O.J. (L 171) 12, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!prod!CELEXnumdoc&lg=Enenu

United States, although enforcing truthful advertising, has generally advocated a path of self-regulation, not government intervention.³⁵ This philosophy has permeated not only the transactions, but any mechanisms for dispute resolution connected with these transactions in electronic commerce. Thus, there is an inherent difficulty in the global context in trying to harmonize laws governing ODR and other remedies for transactions involving electronic commerce, due to the varied governmental policies and objectives sought and the varied cultural contexts in which they are applied.³⁶

The focus on on-line mechanisms for dispute resolution is a direct response to the uncertainty generated by a lack of uniformity in applying judicial and prescriptive jurisdiction to electronic commerce.³⁷ This uncertainty, in turn, is causing an increasing barrier

mdoc=31999L0044&model=guichett; Directive 2000/31/EC of 8 June 2000 of the European Parliament and of the Council on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce ("Directive on electronic commerce"), 2000 O.J. (L 178) 1, www.fs.dk/uk/acts/eu/ehand-uk.htm; *infra* notes 77-86 and accompanying text. In the recent Commission Recommendation, the European Commission stated that a consumer should be informed of his option "of seeking legal redress through his own judicial system." Commission Recommendation 2001/310/EC of 4 April 2001 on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes, 2001 O.J. (L 109) 56, <http://europa.eu.int/comm/consumers/whatsnew/oldnews0105en.html>.

35. See, e.g., Press Release, Federal Trade Commission, FTC, Commerce to Host Public Workshop to Explore Online Dispute Resolution (Feb. 9, 2000), www.ftc.gov/opa/2000/02/adrrev.htm.

"Consumer confidence also requires that consumers have access to fair and effective redress for problems arising in the online marketplace. At the same time, it is important to encourage the growth of this new marketplace and to avoid unduly burdening businesses, particularly small- and medium-sized enterprises." *Id.* The report of the Joint Workshop, released in November 2000, details consumer concerns. See FTC & Dept. of Commerce, Summary of Public Workshop (Nov. 2000), www.ftc.gov/bcp/altdisresolution/summary.htm; see also FTC Public Roundtable: Dispute Resolution for Online Business-to-Consumer Contracts (Feb. 6, 2001), www.ftc.gov/bcp/altdisresolution/roundtable/index.htm.

The FTC has also tried to educate sellers online. See Electronic Commerce: Selling Internationally, A Guide for Business, at www.ftc.gov/bcp/online/pubs/alerts/ecombalrt.htm (last visited Oct. 24, 2001). The U.S. government, like other governmental and non-governmental entities, has several different agencies and organizations studying aspects of electronic commerce, illustrative of the fragmented approach evident especially in the area of consumer use of the Internet and electronic commerce dispute resolution.

36. See, e.g., Electronic Data Interchange, Internet and Electronic Commerce, Hague Conference on Private International Law, Prel. Doc. No. 7, April 2000; EC Joint Research Centre EC DG Information Society, Workshop on Out of Court Dispute Settlement in Trans-Border Electronic Commerce (21 March 2001), http://dsa_isis.jrc.it/ADR/workshop.html; Building Trust in the Online Environment: Business to Consumer Dispute Resolution Conference 12-13 (Dec. 2000) (reporting on joint conference organized by the OECD, ICC, and the Hague Conference), [http://www.olis.oecd.org/olis/2001doc.nsf/LinkTo/DSTI_ICCP_REG_CP\(2001\)2](http://www.olis.oecd.org/olis/2001doc.nsf/LinkTo/DSTI_ICCP_REG_CP(2001)2); see *infra* notes 72-86 and accompanying text.

37. See generally Internet: Which Court Decides? Which Law Applies? (Katharina Boele-Woelki & Catherine Kessedjian eds., 1998); American Bar Association Jurisdiction in Cyberspace Project, Draft, Achieving Legal and Business

to transborder commerce. Parties to crossborder transactions must have confidence not only in the ability to surmount technological barriers, such as the need for authenticity and privacy,³⁸ but also in the capacity to resolve subsequent disputes in an equitable and efficient manner, even if those disputes involve parties and occurrences half way around the world. Nowhere is this need more pronounced than in transactions involving consumers as purchasers. Thus, providing a uniform approach to remedies for transactions involving electronic commerce may facilitate and increase electronic commerce itself. These remedies would connect rules for transacting business electronically with mechanisms for resolving related disputes by means of ODR.³⁹ By assuring customers of a process for dispute resolution on-line, consumer confidence has been increased.

A. *Paths of ODR*

The emergence of ODR has generally followed two basic and sometimes overlapping paths. The first type of ODR, the new medium ODR, has been an outgrowth of some of the traditional and existing forms of ADR moving into cyberspace with the availability of expanding technology. For example, the Inter-Pacific Bar Association ("IPBA") has taken traditional arbitration and created a platform and rules to utilize new technology to create a forum for international arbitration that will be cheaper and faster than traditional arbitration.⁴⁰ Several of the traditional centers for ADR have expanded to incorporate on-line services, hoping to take advantage of the new technology to create a more efficient mechanism.⁴¹ From this

Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet (2000). The Cyberspace Project was begun in 1998, under the leadership of the Section of Business Law, Committee on the Law of Cyberspace, with the Sections of Intellectual Property; International Law and Practice; Public Utility, Communications and Transportation Law; Science and Technology; and Taxation cosponsoring the project. Tom Vartanian chaired the Committee.

The U.S. Congress has also been actively pursuing the issue of jurisdiction in cyberspace in connection with the Internet. The House Judiciary Committee, Subcommittee on Courts and Intellectual Property has been looking at those issues that are relevant to federal court jurisdiction. The Subcommittee held hearings on June 29, 2000, entitled *The Internet and Federal Courts: Issues and Obstacles*. The testimony is available on the US House of Representative's website, <http://commdocs.house.gov/committees/judiciary/hju66042.000/hju66042-0f.htm..>

38. The issues of privacy and authenticity are beyond the scope of this article.

39. The most successful example of this is the eBay/SquareTrade partnership which has helped to resolve disputes between buyers and sellers.

40. See *infra* notes 70-72 and accompanying text. The use of the electronic medium for arbitration and its effect on the requirement for a "writing" in connection with the existing New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as on the UNCITRAL Model Law on International Commercial Arbitration, has been studied recently by the UNCITRAL Working Group on Arbitration which has made some legislative and interpretative recommendations. See Report of Working Group, *supra* note 3.

41. These include the ICC and the American Arbitration Association.

new medium, traditional providers⁴² also hope to expand the market for ADR by making it more affordable and more accessible—and ultimately a more attractive alternative than litigation. Thus the new technology has made expansion to cyberspace possible, also spawning a movement for simpler procedures. The new medium has brought with it new needs, such as providing security and privacy. Even the simple problem of submitting an essential exhibit, such as a contract that exists in the paper and pen world, mandates an adjustment for a totally electronic world.⁴³

The second type of ODR results from, and is ancillary to, the burgeoning of electronic commerce. Electronic commerce, inherently transborder—whether domestic or international—and inherently anonymous has generated multiple industries to create mechanisms to instill trust and confidence in the new marketplace for both business and consumer transactions.⁴⁴ Some of these mechanisms involve providing security, such as through digital signature procedures. Other forms attempt to provide audit services to ensure that the real world entities match those in cyberspace. Still others attempt to bolster confidence in e-commerce transactions through the mechanism of trustmarks.⁴⁵ The trustmark system is no different from the “Good Housekeeping Seal of Approval,” except that it certifies the reliability of the merchant/seller or “e-tailer” rather than a product. The trustmark concept first gained support in the European Union countries⁴⁶ and now exists in the United States and Asia as well.⁴⁷ For example, one system, Trusted Shops, a German-based site,

42. These include CPR Institute for Dispute Resolution and National Arbitration Forum.

43. The ICANN rules allow submission of hardcopy as well as electronic materials. See ICANN Rules for Uniform Domain Name Dispute Resolution Policy, Rule 2(b) (1999), www.icann.org/udrp/udrp-rules-24oct99.htm; *infra* Part I. D.

44. For example, GeoTrust offers services to secure transactions, provide identity validation and authentication for Internet transactions. See <http://www.Geotrust.com>.

45. One of the best examples of the trustmark system in connection with e-commerce is the seal program established by SquareTrade which specifically incorporates reliable and inexpensive on-line dispute resolution. SquareTrade lists the five most important considerations to buyers as including “seller’s commitment to mediation” and requires as part of the SquareTrade Seal that the seller is “[c]ommitted to resolving disputes—including responding to disputes filed with SquareTrade within 2 business days.” SquareTrade, Seal Program, Learn More, at https://www.squaretrade.com/sap/jsp/lrm/learn_seal.jsp?jsessionid=wmssaurev1?vhostid=tomcat2&stmp=squaretrade&cntid=81gjporef1&sapid=wmssaurev1 (last visited Nov. 6, 2001).

46. For a discussion and inventory of trustmarks as of 2000, see the report prepared by the Global Business Dialogue on Electronic Commerce (“GBDe”) which describes itself as “a worldwide, CEO-driven effort to develop policies that promote global electronic commerce for the benefit of businesses and consumers everywhere.” The report is available at <http://www.rsac.org/press/news-info.shtml> (last visited Nov. 1, 2001). Some of the early European trustmarks include: Trusted Shops (<http://www.trustedshops.com>) and TrustUK (<http://www.trustuk.org.uk>).

47. Online Shopping Trust operates in Japan. See <http://www.jadma.org/e> (last

provides a moneyback guarantee to consumers who purchase from shops that belong to the group,⁴⁸ while Whichonline, a UK trustmark system, requires that complaints be handled fairly and that consumers must be provided with procedures for solving disputes.⁴⁹ The trustmark was designed in part to fill the vacuum of uncertainty created by the unanswered questions of jurisdiction and choice of law in cyberspace.⁵⁰

How does this relate to the creation of ODR? To help fill the void of confidence in the use of e-commerce, especially in the consumer context, retailers have focused on providing means of redress for customers who are often located a continent away.⁵¹ The trustmark encourages the buyer to trade the comforts of local (or national) courts for certain guarantees of conflict resolution. These methods for redress/recovery have generally utilized ODR mechanisms. One well-known and highly successful example of this is the e-tailer eBay, the on-line auction site. To increase consumer confidence in the virtual auction process, eBay hired SquareTrade to provide eBay customers with mediated ODR that would be an inexpensive and fast alternative to traditional litigation or off-line ADR.⁵² Other e-tailers have chosen to incorporate ODR and to assure consumers of the availability of an internal redress system.

B. *Types of ODR Services and Providers*

A basic question in the context of ODR is what constitutes “dispute resolution?” Surely it includes arbitration, mediation, negotiation and

visited Oct. 24, 2001). Three groups are currently collaborating on an international trustmark: BBBOnline, FEDMA, and Eurochambres.

48. See <http://www.trustedshops.de> (last visited Oct. 24, 2001). The site was originally directed at purchases from German merchants.

49. WhichOnline is at <http://www.which.net/shopping/guide.html> (last visited Oct. 24, 2001). WhichOnline, a UK system, is “designed to make sure consumers get a fair deal and to provide them with protection if things go wrong.” The system covers mostly domestic companies. “We believe that online shopping can be both convenient and safe. Our code of practice for online traders is designed to encourage the highest possible standards and make sure that you are treated fairly.” The code of practice requires that complaints be handled fairly, speedily, and consumers must be provided with procedures for solving disputes. Interestingly, the rules also require that the “web trader” or merchant must be governed by UK law, thereby removing some of the uncertainty in choice of law. WhichOnline, *Online Shopping*, at <http://www.which.net/shopping/guide.html> (last visited Oct. 24, 2001).

50. *Id.* WhichOnline actually avoids choice of law issues by requiring that UK law must be used.

51. For example, a recent survey by Consumers International, a group of 260 consumer organizations in almost 120 countries, found that on-line shoppers were not receiving goods they purchased or receiving refunds. In addition, only twenty percent of websites surveyed provided clear information on the total cost of the transaction. Consumers International, *Should I Buy? Shopping Online 2001: An International Study of Comparative Electronic Commerce* (2001), http://www.consumersinternational.org/CI_Should_I_buy.pdf.

52. SquareTrade now provides this service to eBay and several other companies.

the more recognized forms of ADR. But when applied to e-commerce, it has been expansively defined to cover internal and external complaint mechanisms.⁵³ It takes within its purview mechanisms established by governmental units, such as the FTC's on-line mechanism for initiating complaints in the global community, econsumer.gov. This dispute resolution system is a cooperative effort of entities in several countries. Dispute resolution also encompasses high automation ODR systems with no real human intervention, such as [cybersettle](http://cybersettle.com) and [clicknsettle](http://clicknsettle.com). Both of these sites offer a service that resolves disputes through what amounts to a bidding program for which the user pays a fee, which may be based on the amount in controversy.⁵⁴

Private entities supplying ODR are quite varied, both in level of automation and in services provided.⁵⁵ The majority provide non-binding dispute resolution, usually in the form of mediation or some other less-structured service. The interactive websites vary in degree of personalized response and depth of advice provided. There are interactive chatrooms and sites that provide free answers to legal questions.⁵⁶ Some act also as referral services and route the client to a legal professional appropriate for the dispute or legal need.⁵⁷ Still others are designed to provide certain services or answers on a per-use basis.⁵⁸ Some sites are multi-functional, providing arbitration, mediation, and other services, while others are layered to provide escalating levels of service as necessary.⁵⁹

Not all ODR is interactive. State Bar associations, such as that of Maine,⁶⁰ do not answer questions on-line but provide forms which may be downloaded and which are designed to cover a range of legal services, including divorce. State and local governmental entities often have passive websites that provide advice and forms for handling disputes.⁶¹ There are also multiple computer programs that one can purchase that create these forms for routine legal matters, including disputes such as divorce. Some of the general legal sites

53. See, e.g., <http://BBBOnline.org> (last visited Oct. 24, 2001).

54. See *infra* Part I.B.1.

55. For instance, one site actually allows a mock trial where the client can submit a real case to a "jury." See <http://www.icourthouse.com> (last visited Oct. 24, 2001). A UK site, Desktoplawyer.co.uk, allows one to prepare complicated documents and also offers a separate program for over-the-phone advice.

56. See, e.g., <http://divorcenet.com> (last visited Oct. 24, 2001).

57. See, e.g., <http://MyCounsel.com> (last visited Oct. 24, 2001); <http://askalawyer.com> (last visited Nov. 9, 2001).

58. See, e.g., <http://legaladvice2.com> (last visited Oct. 24, 2001); <http://lawexpress.com> (last visited Oct. 24, 2001).

59. See, e.g., <http://OnlineResolution.com> (last visited Oct. 24, 2001); <http://IntelliCourt.com> (last visited Oct. 24, 2001).

60. See, e.g., <http://www.mainebar.org> (last visited Oct. 24, 2001).

61. See, e.g., <http://www.ftc.gov> (last visited Oct. 24, 2001).

passively provide information on aspects of dispute resolution.⁶² Other sites are designed to act like a clearinghouse for complaints, such as the BBBOnline, and may require merchant members to agree to be bound by any determination. Consumers can obtain advice and information on handling disputes from combination sites that provide passive and interactive help from consumer and private interests groups, professional associations, and recognized ADR providers.⁶³

All of these sources provide "legal services," in the form of information, counseling, or actual conflict resolution, and all seek to provide these inexpensively or without charge and efficiently. Many of these services are provided by nonlawyers or lawyers acting outside of their professional context and, thus, are frequently beyond the reach of legal disciplinary authorities and outside the realm of unauthorized practice of law. The wealth of ODR sources has expanded the market of potential customers (or clients) by making access not only cheaper, but easier. Access is now available when the consumer needs, often twenty-four hours a day, allowing the consumer to "time-shift" dispute resolution just as the video cassette recorder has done for television viewing.

A quick perusal of some of these sites reveals several common shortcomings. A large number do not contain any geographical limitation but, like cyberspace itself, appear to be borderless. A significant number contain extensive disclaimers of liability, the practice of law, or the creation of any attorney-client relationship. The majority do not appear to provide any method of redress for dissatisfaction with the dispute resolution services provided. The amount of information supplied about the ownership of the entity or individual ODR provider, training, licensing, and selection of lawyers or neutrals, monitoring or auditing of performance, and potential enforcement of any ultimate result is often insufficient. A significant number do, however, contain statements about privacy and confidentiality of communications.

Some of the better ODR provider sites, such as SquareTrade, partner with merchants to provide a seal that includes dispute resolution components. SquareTrade emphasizes disclosure of policies and adherence to ethical standards. Another ODR provider, Online Resolution,⁶⁴ offers full service ODR, including evaluation, mediation, arbitration, and negotiation of a myriad of claims, including e-commerce, EEOC, and family conflicts, among others. Online Resolution states that it adheres to ethical standards for neutrals designed by the ABA, SPIDR,⁶⁵ and the American

62. See, e.g., <http://Freeadvice.com> (last visited Oct. 24, 2001); <http://www.cpradr.org> (last visited Oct. 24, 2001).

63. See, e.g., <http://www.LawGuru.com> (last visited Oct. 24, 2001).

64. See <http://onlineresolution.com> (last visited Oct. 24, 2001).

65. Society of Professionals in Dispute Resolution, now subsumed under

Arbitration Association (“AAA”) and provides details of those standards, as well as policies of confidentiality and privacy. In connection with its mediation services, Online Resolution partners with a neighbor, MyCounsel.com, that offers more traditional legal services and advice but for flat fees. MyCounsel handles a range of disputes from personal injury to landlord/tenant and provides different levels of service, from consultation and evaluation to initiation of a claim. It refers clients to “certified lawyers” who may consult on- or off-line. MyCounsel also provides estimates of response time and a thirty day full money-back guarantee.⁶⁶ In contrast, several other online sites amount to little more than advertising ventures by practitioners or referral services or computer programs for settlement.

1. Fully-Automated Examples

One way to differentiate ODR providers is by the level of automation. In the high automation category there are several sites such as clicknsettle.com, cybersettle.com, settlementonline.com, and ussettle.com that are basically computer programs where there is no interaction between parties or with a human neutral or mediator.⁶⁷ Software automatically compares settlement offers in what essentially amounts to a “bidding process.” For example, in one site, clicknsettle, the plaintiff puts in three offers and the other side puts in three offers. If any offers are less than thirty percent apart, the dispute is automatically settled for a compromise figure.

The sites vary with the degree of sophistication and differentiated standards for the basis of settling. All act without a neutral or decision-making human. While, in all these cases, one generally pays a fee, it is significantly less than the cost of hiring a lawyer or litigating. For example, with one service there is a \$15 filing fee, plus fees for each offer or demand entered. If the compromise settlement is less than \$10,000, each party pays \$100; if above, each party pays \$200.⁶⁸ These sites tend to be popular for settling insurance and financial claims and kinds of disputes where there is the expectation of

Association for Conflict Resolution (“ACR”).

66. This is similar to the money back guarantee given by Lawexpress.com which offers advice on a single legal issue by phone for a fee of \$39.95. MyCounsel also seems to be using the ABA as a trustmark, showing a seal that says: “[t]he American Bar Association recognizes MyCounsel.com for providing innovative, affordable legal services.” <http://www.MyCounsel.com> (last visited Nov. 1, 2001).

67. Both cybersettle.com and clicknsettle.com are oriented toward insurance claims. Cybersettle.com claims to be used by over 475 insurance companies “either directly or through their third party administrators.” <http://www.cybersettle.com/about> (last visited Nov. 1, 2001). They also provide different pricing for lawyers and insurance companies. Settlementonline.com claims they are attorneys.

68. http://www.clicknsettle.com/online_fees.com (last visited Oct. 24, 2001).

settlement and all that is at issue is the final amount. Is the automation an improvement? Are the parties more likely to be reasonable when dealing with a computer than with an agent from an insurance company? It is not so clear what advantages this system offers the insured, as opposed to the insurance company. In theory, this type of dispute resolution service should be quicker and cheaper, at least for the insurance company, which in the best of all possible "law and economics worlds" would of course pass on the savings to customers. The bidding system is also predictable, in that both parties know the basic parameters and it provides a confidential means for the parties to exchange settlement offers. These amounts are not revealed to the other party even after the parties fail to settle.⁶⁹ The system reflects the use of new technology applied to traditional issues of settlement. One critical component of a successful dispute resolution system, however, is enforceability, which may be difficult, requiring resort to courts for enforcement of a "contract" made by a computer.

2. Traditional Arbitration in New Technological Dress

Another category of dispute resolution providers is those that have taken traditional arbitration techniques and applied them to both on- and off-line disputes to create a faster and more efficient process.⁷⁰ Arbitration may lend itself more to the on-line medium than mediation. It is designed for communication that is not as much dialogue, but submission of evidence, testimony, and positions to a neutral decision-maker or decision-makers. These decision-makers in the international context are often dispersed around the world, as are the parties. Commercial arbitration also has many existing mechanisms for enforcement, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁷¹ and the Inter-American Convention of International Commercial Arbitration.⁷² By using the on-line environment, one can reduce costs of travel and in-person hearings, as well as increase the speed by which evidence and argument are presented and decisions reached. The trade for some of these cost savings is foregoing live testimony, viewed in the Anglo-American tradition as an important aspect of judging credibility. Thus, on-line technology offers a creative solution to the high transaction costs associated with off-line arbitration.

69. It is also available twenty-four hours a day, like the Seven-Eleven, so if you get a craving to settle at 3:00 a.m., you can go on-line.

70. See generally Roger P. Alford, *The Virtual World of Arbitration*, J. Int'l Arb., Aug. 2001, at 449; Arsic Jasna, *International Commercial Arbitration on the Internet, Has the Future Come Too Early?*, J. Int'l Arb., Sept. 1997, at 209.

71. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 84 Stat. 692, 330 U.N.T.S. 3.

72. 14 I.L.M. 336 (1975).

One example of the potential of on-line dispute resolution is the current project of the IPBA to establish a cyber arbitration system. Their rules look a bit like the traditional transnational arbitration tribunals, such as the ICC or LCIA, but with the new technology incorporated, so that timing and definitions are changed. The IPBA has incorporated digital technology, utilizing the Internet, to conduct multi-location hearings. At least initially, some activities would be conducted "on-site" since not all parties would be able "to participate by 'cyber' means." This realization reflects the difficulties in conducting on-line arbitration when not all participants have the newest technology, especially in emerging economies, a factor that is relevant in the international context. The IPBA has also considered the difficulty in attracting disputes to a new forum and the role that clients could play in encouraging the use of the new technology, especially as a means of cost reduction and as an attractive and efficient alternative to current methods of off-line arbitration.

3. Mediation

There have been several providers who have tried to translate the mediation process to cyberspace.⁷³ Early projects were conducted by the Center for Information Technology and Dispute Resolution, established in 1997, at the University of Massachusetts, as part of the work of Online Ombuds. Online Ombuds provided ODR for a two-month period to mediate disputes on-line between buyers and sellers on eBay, the on-line auction system. Online Ombuds utilized a single mediator, with Internet e-mail for all communications.⁷⁴ This initial

73. See, e.g., <http://OnlineResolution.com> (last visited Oct. 24, 2001); <http://www.squaretrade.com> (last visited Oct. 25, 2001); <http://internetneutral.com> (last visited Oct. 24, 2001); <http://mediate-net.org> (last visited Oct. 24, 2001).

74. The mediator used e-mail to see if the noncomplaining party was willing to participate and to get the basic information. Each party provided a narrative from which the mediator attempted to distill basic issues and posit facts and conditions. Out of 225 complaints, mediation was attempted with 144. Of these, not surprisingly, three quarters were brought by buyers. About forty-six percent of disputes that were filed for mediation procedures were resolved by the mediation.

The director of the UMass Center, Ethan Katsh, has written about some of the difficulties with the on-line mediation process and the impact of translating what usually occurs verbally into written text and the transferring of e-mail and messages from one party to another, with the mediator framing and shaping the communications. The process was timely, but not necessarily cost-effective if conducted for a for-profit procedure. On the other hand, it certainly increased consumer confidence of buyers on eBay when there was a potential for dispute resolution. It is questionable whether it provided more comfort than a chargeback mechanism through a credit card would do. It also may do no more than the existing mechanism eBay provides of allowing the posting of feedback that in effect ties one's reputation as a seller to buyer satisfaction.

Online Ombuds has posted transcripts of five on-line mediations that were conducted in March of 1999 as part of a pilot project with ebay. See <http://www.disputes.net/cyberweek2000/ebay/ebayintro.htm>.

project was subsequently taken over by SquareTrade, a for-profit enterprise that partners with retailers to provide ODR.

The effectiveness of on-line mediation has been questioned. Mediation is often recommended and encouraged where parties have had an ongoing relationship and the mediator can draw on the parties' prior and continuing experience. That is missing in many ODR transactions where the parties are often consumers or buyers in one-shot deals and there is no past experience and not much interest in ensuring a future working relationship, but only an interest in resolving this one dispute.⁷⁵ Most importantly perhaps, the medium itself creates a challenge for mediation, where interpersonal connection is often considered crucial. In ODR, written on-line communications often lose the tone of the participants. One is not able to judge how flexible a party might really be and whether a party's feelings on a point are strong or weak. There are no visual cues to guide the mediator. Nor is there an opportunity for the parties to feel a sense of shared accomplishment and shared goals.

The underlying question is whether physical distance means or creates psychological distance?⁷⁶ And whether loss of personal contact means loss of personality, reputation, and confidence, all important to mediation and to a lesser extent to arbitration. The on-line medium for mediation also raises questions where there may be limited access to the new technology, especially in the consumer population in connection with on-line resolution of non-electronically generated disputes. Even among users of computers, there may be discomfort with using the medium for lengthy or detailed communications. A final limitation of on-line mediation is the perceived need for written procedures or rules when working in the written form and without verbal communication. Yet mediation often requires a level of flexibility and fluidity in process that does not lend itself to detailed procedures and rules.

C. *Recent Initiatives for ODR*

The majority of governmental and intergovernmental efforts in connection with on-line dispute resolution and dispute resolution for on-line transactions⁷⁷ has been concentrated exclusively or primarily

75. A mediator for SquareTrade who handles eBay complaints suggests that this is not true with eBay purchasers who engage in repeat transactions, albeit not always with the same seller.

76. "The great paradox of online mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution designed to involve participants in direct interpersonal contact. . . . Cyberspace is not a 'mirror image' of the physical world." Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 *BYU L. Rev.* 1305, 1310 (footnotes omitted).

77. As discussed earlier, these two concepts are distinct, although they may overlap. A system of on-line dispute resolution may be primarily designed to handle consumer claims resulting from on-line transactions, but may also be a means of

on consumer transactions. The initiatives attempt to incorporate electronic technology into the mechanism for dispute resolution to provide efficient, economical, and quick dispute resolution. Several governmental and private entities, such as the Organization for Economic Co-operation and Development ("OECD"), the European Union, the International Chamber of Commerce, Global Business Dialogue ("GBDe"), and the U.S. Department of Commerce and the Federal Trade Commission, have produced studies and conducted workshops,⁷⁸ all aimed primarily at consumer transactions in e-commerce. The technology available currently makes it difficult to determine the location of a customer. Similarly, it may be impossible to distinguish a consumer from small business enterprises. Difficulties in jurisdiction and choice of law, present in any form of transnational dispute resolution, are exaggerated by the ease in which multiple borders are crossed, often even without knowledge of the participants. Similarly, mechanisms for enforcement for both interim and final relief face increased pressure from the web of mandatory law that may entangle the ultimate decision. Consumer transactions merely exacerbate the problem.

On the international front, the European Union in its Directive on electronic commerce,⁷⁹ has specifically focused on the need to provide access to dispute resolution, both judicial⁸⁰ and out-of-court mechanisms,⁸¹ the latter including on-line means, as an essential aspect of the development of electronic commerce. Article 17(1) provides:

providing redress for claims not resulting from on-line transactions. *See supra* notes 32-36.

78. *See supra* notes 32-36 and accompanying text.

79. Directive 2000/31/EC of 8 June 2000 of the European Parliament and of the Council on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce ("Directive on electronic commerce"), 2000 O.J. (L 178) 1, www.fs.dk/uk/acts/eu/ehand-uk.htm.

80. *Id.* at 7. Recital (52) provides:

The effective exercise of the freedoms of the internal market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extent; in view of this specific character and the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, this Directive requests Member States to ensure that appropriate court actions are available; Member States should examine the need to provide access to judicial procedures by appropriate electronic means.

Id.

81. *Id.* Recital (51) provides:

Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders.

Id.

Member States shall ensure that... their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.⁸²

As part of its work on out-of-court settlement, the EU has prepared an extensive study⁸³ that discusses the regulatory framework and provides an inventory of some existing on-line out-of-court dispute settlement systems, as well as a discussion of the off-line systems and consumer complaint/ombudsman-type programs.

The OECD has also established guidelines to protect consumers in electronic transactions.⁸⁴ These guidelines, in addressing dispute resolution, consider both applicable law and jurisdiction. "Consumers should be provided meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden."⁸⁵ The guidelines, like those of the European Union, also link facilitating electronic commerce to providing consumers with access to efficient means of ADR and other on-line remedies. The United Nations Commission on International Law ("UNCITRAL") has addressed aspects of ODR, especially in connection with arbitration and conciliation,⁸⁶ and has been working on ways to ensure enforceability of decisions.

In the United States, both the FTC and Department of Commerce have undertaken studies and issued recommendations for both e-commerce and dispute resolution. Many of the stakeholders, including business associations and ODR providers, both here and abroad, have undertaken initiatives to deal with the problems of e-commerce and dispute resolution. Within the legal profession, the American Bar Association has formed a Task Force on ADR and E-commerce⁸⁷ specifically to study the problems of dispute resolution in

82. *Id.* at 14. Article 17 (2) provides:

Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

Id.

83. Comm'n Joint Research Centre on Out-of-Court Dispute Settlement Systems for E-commerce, Final Report (Apr. 20, 2000).

84. Recommendations of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce (Dec. 9, 1999), <http://www.oecd.org/dsti/sti/it/consumer/prod/CPGuidelines-final.pdf>.

85. *Id.* at Part 2.VI.B.

Businesses, consumer representatives and governments should work together to continue to provide consumers with the option of alternative dispute resolution mechanisms that provide effective resolution of the dispute in a fair and timely manner and without undue cost or burden to the consumer.

Id.

86. *See supra* note 40.

87. The Task Force is the joint effort of five sections of the ABA and is chaired by Bruce Meyerson, Vice Chair of the Section of Dispute Resolution. The vice chair of

e-commerce and to draft protocols, guidelines, and standards. The Task Force has looked at several aspects of e-commerce and has focused on ODR, holding hearings to include stakeholders, providers, and governmental agencies, as well as to incorporate international responses and conducting extensive on-line surveys of ODR providers, users, and general consumers here and abroad. The Task Force has drafted tentative recommendations for conduct by ODR providers and focused also on trustmarks and their potential use not just by merchants but by providers of ODR. The Task Force, as a part of the ABA, is one of the few neutral non-stakeholding but non-governmental or intergovernmental entities that provides both a national and international perspective, although a portion of its members are obviously involved in the provision of ADR services and therefore have some vested interest.

D. ICANN And Domain Name Disputes

Perhaps one of the best known ODR systems is that which has been created as ancillary to the domain name process, the Uniform Domain Name Dispute Resolution Policy, established by the Internet Corporation for Assigned Names and Numbers ("ICANN"). The dispute resolution process, described as an administrative proceeding similar to arbitration, is contractually required as part of the terms of obtaining a domain name from ICANN. The ICANN system, designed largely by the World Intellectual Property Organization ("WIPO")⁸⁸ to deal with a limited problem, that of bad faith use of domain names,⁸⁹ provides for dispute resolution by a process that is almost entirely on-line. The underlying dispute is also generated by on-line activity or the use of domain names. All filings and submission of evidence are done by electronic means as well as "hard

the Task Force is Karol Denniston of the Section of Business Law. Professor Anita Ramasastry of the University of Washington School of Law serves as the Reporter and is assisted by Professor Ben Davis of Texas Wesleyan University School of Law. The Task Force maintains a website, hosted by University of Washington Center for Law, Commerce and Technology at <http://www.law.washington.edu/ABAEADR>.

88. See *The Management of Internet Names and Addresses: Intellectual Property Issues*, Final Report of the WIPO Internet Domain Name Process (Apr. 30, 1999), <http://wipo2.wipo.int/process1/report/index.html>; The Final Report of the Second WIPO Internet Domain Name Process, *The Recognition of Rights and the Use of Names in the Internet Domain Name System* (Sept. 3, 2001), <http://wipo2.wipo.int/process2/report/index.html>.

89. This conduct is also called "cybersquatting," and is the focus of recent United States federal legislation. The United States Anticybersquatting Consumer Protection Act was signed into law at the end of November 1999 and provides remedies for domain name disputes which, like the ICANN Rules, are non-exclusive. The Act provides for monetary damages, as well as the remedy of transfer or cancellation of a domain name offered under ICANN. The Act requires the Secretary of Commerce to study the guidelines and procedures for resolving domain name disputes, including the ICANN procedures and policies, and report to Congress within six months. See 15 U.S.C. § 1125(d) (Supp. 1999).

copy” (the latter also being used for annexes which cannot be submitted by electronic means), although the nature of the dispute itself defines a limited area that will have limited evidentiary submissions and little need for oral testimony. The rules specifically exclude in-person hearings other than in exceptional circumstances,⁹⁰ thus reinforcing the position that the absence of in-person hearings does not raise any due process concerns. Nor is confidentiality of the ultimate decision an issue since the rules normally call for publication of the decision on a “publicly accessible web site.” The dispute resolution process, although not an exclusive remedy, is largely enforceable by ICANN, which can require the transfer of a domain name.

Dispute resolution is provided by one of four certified providers.⁹¹ The ICANN Rules suggest a model of on-line dispute resolution that is both efficient and economical. The rules provide for a system that takes advantage of electronic technology to speed the process, so that the average length of the process, from start to finish, is about two months. Under the rules, the panel deciding the proceeding has fourteen days after appointment to render its decision.

The ICANN dispute resolution process is perhaps one of the most active ODR examples, but it operates within very narrow parameters and is basically self-executing, unlike much of the other ODR. While the ICANN procedures may be a cheaper alternative than litigation, there are several short-comings or limitations to the rules which may limit their value as a model for more complex disputes. First, the specific category of cases for which the ICANN Rules are available is quite narrow and applies only to domain name disputes that involve bad faith.⁹² Secondly, while the administrative proceeding is

90. ICANN Rules for Uniform Domain Name Dispute Resolution Policy (1999), www.icann.org/udrp/udrp-rules-24oct99.htm (adopted Aug. 26, 1999). Rule 13, entitled In-Person Hearings, provides:

There shall be no in-person hearings (including hearings by teleconference, videoconference, and web conference), unless the Panel determines, in its sole discretion and as an *exceptional matter*, that such a hearing is necessary for deciding the complaint.

Id. R. 13 (emphasis added).

91. So far only four providers have been designated: eResolution; The National Arbitration Forum; CPR Institute for Dispute Resolution; and WIPO. See ICANN, Approved Providers for Uniform Domain Name Dispute Resolution Policy, at <http://www.icann.org/udrp/approved-providers.htm> (last updated Apr. 14, 2001). WIPO is serving as a provider and as the source of much of the format for the uniform policy and rules. ICANN allows the certified providers to issue supplemental rules not inconsistent with those of ICANN. All four providers have issued supplemental rules. Between December 1999 and November 2001, over 4699 proceedings were resolved. See ICANN Statistical Summary of Proceedings Under Uniform Domain Name Dispute Resolution Policy, at <http://www.icann.org/udrp/proceedings-stat.htm> (last visited Nov. 6, 2001).

92. To fit within the rules, the dispute must meet the following three criteria: (1) domain name must be identical or confusingly similar to a name in which the

compulsory, it is not binding and does not preclude seeking review or other remedies through court procedures. The force of the decision is obtained primarily through the agreement of the parties to the decision and the ability of ICANN to enforce any determination through its control of domain names or what is equivalent to access. This enforcement mechanism, then, is limited to the unique aspect of the product involved. In addition, there have been several studies that charge a lack of neutrality in the selection process for arbitrators⁹³ and review the number of times different arbitrators have found against the domain name registrant, as opposed to the party claiming bad faith registration. Thus the system is not perfect.

II. ESSENTIAL ELEMENTS FOR ON-LINE DISPUTE RESOLUTION SYSTEM

One of the initial questions in establishing standards or regulations for ODR is whether different standards should apply to ODR providers as opposed to off-line ADR providers.⁹⁴ While the anonymous and borderless nature of cyberspace imposes significant barriers to the potential enforcement of awards or auditing of ODR activities, there are some who would argue for equivalence or nondiscriminatory treatment of on-line and off-line providers. The difference in technology should not change the legal implications of the process or result.⁹⁵ On the other hand, perhaps additional controls

complaining party has trademark rights, either registered or common law trademark; (2) the domain name holder must have no legitimate right or interest in the name; and (3) the domain name must have been registered and used in bad faith. See ICANN Rules, *supra* note 90, R.3(b)(ix).

93. There is a vast array of articles and studies of ICANN dispute resolution. Two well-known critics of the process are Professor Michael Geist, a law professor at the University of Ottawa, and Professor Michael Froomkin, a law professor at the University of Miami. Both maintain extensive websites with links to the significant studies of ICANN decisions. Geist produced a study of ICANN, entitled *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, <http://aix1.uottawa.ca/~geist/geistudrp.pdf&e=42> (Aug. 2001). Froomkin edits ICANN Watch and has written several articles criticizing the ICANN domain name dispute resolution process. <http://personal.law.miami.edu/~froomkin> (last visited Oct. 25, 2001).

94. SquareTrade, in its prologue to its Standards of Practice for Online Dispute Resolution, states that “[d]ue to the unique circumstances created by providing ADR services online, the SquareTrade Standards of Practice extend beyond traditional ADR standards.” See http://www.squaretrade.com/cmt/jsp/lgl/standards_med.jsp (last visited Oct. 25, 2001).

95. An analogous approach in connection with e-commerce is suggested by the UNCITRAL Model Law on Electronic Commerce which adopts a functional equivalence between electronic and non-electronic commerce. Article 5, Legal Recognition of Data Messages, provides: “Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.” UNCITRAL Model Law on Electronic Commerce, Art. 5, U.N. Doc. A/51/628 (1998), <http://www.uncitral.org/english/texts/electcom/ml-ecom.htm>.

should be imposed on ODR providers since they often fall between the cracks of regulators (government or professional) both geographically and structurally. As mentioned earlier, the legal profession is not consistent in its characterization of what constitutes the practice of law and is therefore within the purview of regulation. Additional monitoring—and apart from that imposed on the legal profession—is justified when one views the activities of ODR as e-commerce itself and thus subject to the controls imposed on merchants (lawyer and nonlawyer) who engage in transactions in cyberspace.

Any system of ODR needs to incorporate several principles, many of which are inherent even in a traditional paper-based dispute resolution system. The system should guarantee equal treatment of parties.⁹⁶ The system should include impartial neutrals, arbitrators or mediators, preferably independent of any party, or if not, there should be clear disclosure of any conflicts of interest. Transparency, encouraged by some, may not be desirable in all forms of ODR, such as on-line arbitration, where the parties may have pre-selected arbitration for its confidentiality.⁹⁷ Any system must provide a fair opportunity for parties to present their cases and be “heard,” or procedural due process, within established rules and timeframes that are uniform. The system should allow a party to represent oneself, especially in the consumer context, but also to utilize counsel if wanted.

When the dispute resolution uses an electronic medium, these rules may need to be modified to accommodate the anonymous world of cyberspace.⁹⁸ The ODR provider should provide full and clear disclosure of certain minimal information so that the user is able to

96. See, e.g., UNCITRAL Model Law on International Commercial Arbitration, Art. 18, U.N. Doc. A/40/17, Annex I (1985), <http://www.uncitral.org/English/texts/arbitration/ml-arb.htm>. Article 18, entitled, Equal Treatment of Parties, provides: “The parties shall be treated with equality and each party shall be given the full opportunity of presenting his case.” *Id.*

97. In contrast, the ICANN system publishes decisions, but its decisions are more in the realm of administrative law and public interest, than private law. ICANN Uniform Domain Name Dispute Resolution Policy Paragraph 4j, provides:

Notification and Publication. The Provider shall notify us of any decision made by an Administrative Panel. . . . All decisions under this Policy will be published in full over the Internet, except when an Administrative Panel determines in an exceptional case to redact portions of its decision.

ICANN Uniform Domain Name Dispute Resolution Policy (1999), <http://www.icann.org/udrp/udrp-policy-24oct99.htm>.

98. See *supra* note 94. SquareTrade Standards of Practice for Online Dispute Resolution include the following areas: (1) neutrality and impartiality; (2) conflicts of interest; (3) confidentiality, privacy, and security; (4) competence and quality; (5) fair process; (6) transparency; (7) technological competence; (8) accessibility. The SquareTrade Standards reflect a full disclosure of significant elements. See http://www.squaretrade.com/cnt/jsp/lgl/standards_med.jsp (last visited Oct. 25, 2001).

determine in advance who the ODR provider is, what the process is, and what the full costs will be. Parties should also know policies of confidentiality, privacy, and potential recourse against the provider. Second, new rules will also be needed to reflect the electronic medium. For instance, what constitutes "submission" in a system that occurs on-line? How does one authenticate evidence that is submitted? How does one verify or sign a document? How does one authenticate that a copy is indeed what it purports to be? What constitutes a "hearing" in cyberspace?

In keeping with the goal of encouraging confidence in electronic transactions, any dispute resolution system should incorporate not only harmonized procedural rules, but also predictable rules for judicial jurisdiction and choice of law. Party autonomy in selection of choice of forum and choice of law should be respected and encouraged. Rules establishing presumptions or default rules for choice of law in the absence of agreement in advance by the parties could also incorporate deference to mandatory laws⁹⁹ and increase predictability in transactions.

III. ENSURING INTEGRITY IN THE ODR ENVIRONMENT

As the "client" has moved into cyberspace, the user of legal services has become a consumer in e-commerce, not necessarily cloaked with the protections and regulations that the brick and mortar world provide—or the protections resulting from monitoring of the conduct of legal professionals. Just in terms of the controls imposed by state courts and agencies licensing and disciplining lawyers, there is little established law or enforcement in the majority of states.¹⁰⁰ Indeed the states have disagreed on many of the legal ethical issues, including advertising and solicitation issues, confidentiality, the creation of an

99. These choice of law rules, in the absence of designation by the parties, might look similar in form but not content to the ones drafted by the American Law Institute ("ALI") in Section 6 in connection with domestic litigation primarily in the Complex Litigation Project. *See* ALI Complex Litigation Project §§ 6.01-03 (1993).

Another example are those in the Uniform Computer Information Transactions Act ("UCITA") as approved by the National Conference of Commissioners on Uniform State Law ("NCCUSL") in July 1999. *See* Uniform Computer Information Transactions Act, National Conference of Commissioners on Uniform State Laws § 109 (2000), Choice of Law (establishing default rules in the absence of party choice and recognizing consumer mandatory law); *see also id.* § 110, Contractual Choice of Forum (providing for party selection "unless the choice is unreasonable and unjust"). *See generally* Amelia Boss, *The Jurisdiction of Commercial Law: Party Autonomy in Choosing Applicable Law and Forum Under Proposed Revisions to the Uniform Commercial Code*, 32 *Int'l Law.* 1067 (1998).

100. Even when there is regulation, there is no coordinated enforcement in multiple states since legal practice is regulated along state lines but transactions involving on-line dispute resolution are more likely to be cross-border or even international. The international component is often supplied by underlying transactions in cyberspace that implicate multiple jurisdictions.

attorney client relationship, fee sharing with non-lawyers, and even the scope of what constitutes unauthorized practice of law. But since not all ODR is provided by lawyers and not all ODR is categorized as "practice of law," ODR is a new frontier with pockets of overlapping and perhaps conflicting rules and large areas of unexplored or uncontrolled services. Although the law of e-commerce is still developing, there is a need to consider ways both to facilitate ODR for the general public as a quick and cost-effective means to redress grievances and to ensure that basic standards are created for those who provide ODR. In fact, ODR, like all of e-commerce, needs to have mechanisms to build consumer trust in the goods or services—here legal services in the form of dispute resolution—and to ensure consumer protection. The regulation of legal services, including dispute resolution, need not be delegated wholly to the professional organizations that incorporate a degree of self-interest.¹⁰¹

But what or who creates confidence in these ODR systems? As the interest in ODR has flourished, there is an increasing need for establishing standards or guidelines for providers, perhaps in the form of licensing or (self-)certification. At the moment, the users of ODR—client/consumers—have little ability to determine the reliability of any of these procedures, other than the reputation of the ODR provider. These standards could also help create regimes for subsequent enforcement of any decision or agreement reached.¹⁰² The enforcement mechanism is indeed a crucial part of the equation since ODR, especially in connection with crossborder disputes, offers limited benefits without the potential for implementing any resolution.¹⁰³ For example, an arbitral award made as part of an ODR process may be enforceable in some countries through multilateral or bilateral agreements.¹⁰⁴ Agreements reached through mediation or conciliation currently may be enforced but only if the parties have agreed to a binding result and then often only by subsequent use of court systems for compulsion.

101. "Although the organized bar has always justified its campaign against lay competitors in terms of public protection, the historical record suggests that other, somewhat less altruistic forces have been at work." Rhode, *supra* note 6, at 209. See generally Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229 (1995).

102. See *infra* text accompanying note 109.

103. ODR still has the potential to reduce transaction costs and speed decisions. ODR may also provide an alternative to congested or undeveloped court and out-of-court systems in individual countries, especially in emerging economies.

104. These awards might be enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, depending on the existence of a written agreement and the interpretation of "writing" by the place of enforcement. See Convention on the Recognition of Enforcement of Foreign Arbitral Awards, June 10, 1958, 84 stat. 692, 330 U.N.T.S. 3, <http://www.adr.org/rule/international/990819ae.html> (last visited Oct. 24, 2001); see also *supra* note 40.

How can we create and enforce standards that will provide trust for users of ODR and the even broader area of on-line legal services?¹⁰⁵ This is the question that intergovernmental, governmental, and private entities have been struggling with as e-commerce has emerged. It is a global problem that ideally would utilize global standards, but at a minimum would seek to provide a national threshold for all providers of ODR.

The question of what kind of standards to apply is dependent in part on who will create the protocols and who will enforce them.¹⁰⁶ E-commerce is global, so who regulates what portion of the transaction?¹⁰⁷ While much on-line dispute resolution is nationally-based, its use in connection with international transactions is increasing, as ancillary to merchant trustmark programs, and is, therefore, not circumscribed by national or regional borders. If I make a purchase from an e-tailer in England who has a trustmark from TrustedShops, I may be entitled even in the U.S. to certain dispute resolution procedures.

Nor need we focus only on traditional consumer transactions to see the global nature, especially within the context of business to business transactions.¹⁰⁸ The new systems of ODR offered by some traditional

105. See *supra* note 25.

106. See generally Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 Berkeley Tech. L.J. 413 (1997).

107. The conflicts of law implications of regulating transactions in cyberspace of any sort can be seen easily from the recent high profile Yahoo.com case brought in the French courts to enforce French laws. See Interim Court Order, Nov. 20, 2000, League Against Racism and Antisemitism—LJCRA v. Yahoo! Inc., No. RG:00/05308, (Tribunal de Grande Instance de Paris) (County Court of Paris), www.cdt.org/speech/international/001120yahoofrance.pdf. The initial injunction was issued on May 22, 2000. The complaint in the U.S. litigation, *Yahoo! Inc. v. La Ligue Contre Racisme et L'Antisemitisme*, C00-21275 PVT ADR (N.D. Cal. 2000) is available at www.cdt.org/speech/international/001221yahoocomplaint.pdf. The case is also discussed in Mylene Mangalindan & Kevin Delaney, *Yahoo! Ordered to Bar the French From Nazi Items*, Wall St. J., Nov. 21, 2000, at B1. See Louise Ellen Teitz, *Parallel Proceedings: Moving Into Cyberspace*, 35 Int'l Law 491 (2001).

108. An example of the use of commercial mediation and arbitration in the business context can be seen in the North American Free Trade Agreement ("NAFTA") which established an Advisory Committee on Private Dispute Resolution, the "NAFTA 2022 Committee," pursuant to NAFTA article 2022 paragraph 4 of Chapter 20. The Committee was charged with reporting and providing recommendations "on general issues referred to it . . . respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in the free trade area." The Committee has been studying the use of on-line dispute resolution mechanisms to resolve these commercial disputes, in conjunction with the U.S.-Mexico Conflict Resolution Center ("CRC"), a non-profit organization located on the main campus of New Mexico State University ("NMSU") in Las Cruces, New Mexico. The CRC was created as the result of a U.S. Congressional initiative to provide education, training and services in the area of ADR for entities engaged in private commercial trade between the U.S. and Mexico. The C.R.C. is headed by Professor Nancy A. Oretskin and Dr. Luis Miguel Diaz. See *Commercial Mediation and Arbitration in the NAFTA Countries* (Luis M. Diaz & Nancy A. Oretskin eds., 1999).

providers of off-line dispute resolution as well as some new sources will also raise jurisdictional issues in connection with mandatory laws, albeit perhaps fewer without the overlay of “consumer” laws. Still, the potential for conflicting regulation and standards is inherent in the borderless nature of cyberspace and therefore of ODR.

Aside from a potential overlay of governmental regulations, there remains the fundamental question of whether standards and regulations should be established by private initiatives or by governmental or intergovernmental entities.¹⁰⁹ At this time, when the technology and law are still developing, perhaps industry self-regulation is a realistic first step, but as discussed below, at some point diverse and conflicting standards and initiatives will require an overarching entity or structure, which could be a combination of private and governmental enterprises. When one thinks of a mechanism to regulate ODR, the analogy to the ICANN model of private/governmental cooperation comes readily to mind. While the concept is similar, many of the issues confronting ODR are more complex. The potential for enforcement also is another mammoth problem in the world of ODR, where unlike the domain name process, access cannot be controlled. Yet the ICANN model offers a concept with promise.

Another “jurisdictional issue,” as significant as geographical borders, is the question of who is regulated by whom. If the goal is to regulate ODR, there are a significant number of different types of providers, ranging from individual attorneys and collaborative groups of lawyers, arbitrators, mediators, negotiators, and governmental and nonprofit consumer protection advocates, to an endless number of private entities and interest groups. In some cases, the Wizard of Oz behind the screen is only a computer program offered by a private company to allow parties to bid on settlement.¹¹⁰ Examining just one group of ODR providers, that of lawyers, illustrates the jurisdictional problems. We are regulated on a state basis yet ODR crosses borders. The multistate character of ODR suggests that perhaps national entities such as the ABA should establish some standards.¹¹¹ But what about transactions that are not within national borders? Even staying within an individual state, we also have to consider whether a lawyer acting as a mediator, for example, is subject to the state legal licensing authority or some other agency. What about states that have chosen to regulate or license mediators and other forms of neutrals?¹¹²

109. See Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. Davis L. Rev. 151 (2000) (arguing that more is needed than industry self-regulation of the privatization of dispute resolution).

110. See <http://www.clicknsettle.com> (last visited Oct. 24, 2001); <http://www.cybersettle.com> (last visited Nov. 1, 2001); <http://www.settleonline.com> (last visited Oct. 24, 2001); <http://ussettle.com> (last visited Oct. 25, 2001).

111. See *supra* notes 7 and 87 and accompanying text.

112. Although there is no national licensing or certification for mediators, several

Adjoining states are likely to have different views on this subject, as evidenced just by the existing variations on what constitutes unauthorized practice of law and rules governing multidisciplinary practice.¹¹³ Thus the “who regulates whom” question in ODR is interwoven with the fundamental question of whether to advocate licensing, certification, or self-regulation. Is ODR more like the practice of law or more like home repair?

As the practice of law has moved more and more to the business of providing legal services, the services have become products for consumers, as clearly evident from the current web-based legal services available and even priced like consumer products.¹¹⁴ Once one accepts the premise that on-line legal services are a commodity being sold to “consumers” or other “merchants,” the idea of regulation through the existing arenas and laws for consumer protection and fraudulent practices affords one mechanism for establishing and enforcing standards. On a national level, one can look immediately to the Federal Trade Commission which indeed has indicated that it will investigate deceptive practices occurring in connection with on-line services. Section 5 of the FTC Act¹¹⁵ provides a basis to regulate both deceptive practices as well as unfair methods of competition. The FTC could establish basic standards for this area, as it has done for forms of sales and solicitation, but given the emerging nature of e-commerce, comprehensive regulation may be premature. The setting of standards and self-certification can still work integrally with current laws governing deceptive practices and fraud that can be used to enforce ODR misrepresentations, especially in connection with disclosures either mandated or self-certified. Since most states have deceptive trade practice statutes, local enforcement is also possible. Many states also have deceptive trade practice acts that provide for private recovery and often for treble damages. While one assumes that the “consumer” of legal services certainly is reluctant to incur additional expenses for legal services to file actions in brick and mortar courts, this outlet could be available for larger transactions and for those involving business transactions. While

states, such as Florida and Virginia, have chosen to regulate mediators or neutrals in some way, either in terms of education, experience, or training. For a recent study and survey by the ABA on state efforts to certify or approve alternate dispute resolution providers (encompassing mediators and arbitrators), see ABA, *State and Local Bar Alternative Dispute Resolution Survey (2001)*, <http://www.abanet.org/statelocal/summaryreport.pdf>. There appear to be more efforts underway in the area of family and divorce mediation where there is a national academy trying to establish standards for certification. In addition, federal courts have also established certain standards for those who engage in court-annexed mediation or arbitration.

113. See *supra* notes 11-20 and accompanying text.

114. See *supra* note 58.

115. 15 U.S.C. § 45 (1997). Section 1 provides: “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.”

existing laws may require some amendment of scope provisions to include on-line services or to define consumers more broadly, the idea of attacking the problem on one front through consumer protection and misrepresentation laws is an attractive use of existing mechanisms to apply to the new technology.

The second prong of setting standards for ODR, and one that is tied to potential enforcement through consumer protection and fraud laws, is the concept of a trustmark for ODR, either provided by a trustmark entity, or at least in the short-term, through self-certification. This trustmark would seek to increase confidence by the users of ODR, just as merchant trustmarks have sought to do for e-tailers.¹¹⁶ The users of ODR, be they consumer or business, have none of the normal channels to guarantee integrity and minimum standards of performance in the virtual world of ODR. If one hires a lawyer to resolve a dispute, one deals with a real person or a real office or a license—there is something connected to a physical existence. In addition, the legal profession already has a sort of trustmark through the state licensing of lawyers and on a national basis, through the ABA. In cyberspace, one has no idea who or what is at the other end. In fact, on many ODR sites, one searches in vain to determine the physical location of the provider or its owners/members, let alone what kind of training they have had. If you want to sue your ODR provider, on whom do you serve a summons and where? A virtual summons in a virtual world, while coming in the future, is not effective today in most systems. A trustmark system, like the Good Housekeeping seal of approval or the Underwriters Laboratory seal, would provide some mechanism for judging among ODR providers and would assure compliance with certain minimum standards. It has the potential to cut across geographic boundaries and provider categories. A trustmark could also provide potential enforcement under existing fraud and misrepresentation laws.¹¹⁷ Ideally, it could also be incorporated into a national or multinational regime of certification and/or regulation overseen and monitored by some entity that would be quasi-governmental or a combination of private and public initiatives.

The trustmark, of course, is but another prong of the creation of standards and codes of conduct for ODR providers. An ODR provider should guarantee to its users fairness, equality, and a full opportunity to present one's case (or due process). Users should have the right to be represented or assisted by a third party at all stages of the procedures. These standards, as mentioned earlier, could be either threshold or aspirational, but should address at least some of

116. See *supra* text accompanying notes 45-52.

117. While the trustmark could also be used by e-tailers to encourage consumers that the ODR provided is of a certain quality, its primary focus is on the users of ODR who may or may not be the direct purchasers of those services.

the following areas: (1) ownership and control; (2) nature of services provided; (3) costs; (4) training of ODR providers, both substantive and technological;¹¹⁸ (5) selection and payment of neutrals or providers; (6) privacy of information provided; (7) policies of confidentiality, authenticity, and security; (8) conflicts of interests; (9) any ethical or professional rules applicable to the process or neutrals; and (10) potential redress for dispute with dispute resolution providers.¹¹⁹ While there is a delicate balance between privacy and transparency, basic disclosure is necessary to protect the users of ODR in the anonymous world of cyberspace.¹²⁰

Hand in hand with the creation of standards for conduct and disclosure is education—educating the users of ODR about what to expect and how to judge providers and educating the providers of ODR on what standards or codes should apply.¹²¹ Both user and provider need to know what the product being bought and sold is. Users need to know what protections are available both from and against the provider. Equally important is the effect and use of disclaimers. The standards and codes should also address the use and effectiveness of disclaimers by ODR providers. At the moment, some ODR providers, as well as more general on-line legal services, disclaim any liability for absolutely anything. Education of users is no different than much of the already existing outreach of bar associations, professional organizations, and consumer groups. The same type of educational outreach needs to be made to users of ODR and probably in the same medium as the service is provided.

Ideally, the efforts of the various players—intergovernmental, governmental, private—should be coordinated, but perhaps it is way too early for this to occur. Regulation of ODR might take a lesson from recent activities at the Hague Conference on Private International Law¹²² in negotiating a Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters—a parallel attempt to provide enforcement of the results of dispute resolution using courts.

118. The technological training is specifically included in the SquareTrade Standards of Practice for Online Dispute Resolution. The Technological Competence section provides that: "A SquareTrade mediator or arbitrator will have the technological competence to conduct the dispute resolution process effectively and efficiently . . ." SquareTrade Standards of Practice for Online Dispute Resolution, at http://www.squaretrade.com/cnt/jsp/lgl/standards_med.jsp (last visited Oct. 25, 2001).

119. This could also include choice of law and forum clauses in anticipation of any dispute with the ODR provider.

120. For an example of a full disclosure of standards adhered to by an ODR provider, see SquareTrade Standards of Practice for Online Dispute Resolution, at www.squaretrade.com/cnt/jsp/lgl/standards_med.jsp (last visited Oct. 25, 2001). See also Legal Websites Guidelines, *supra* note 7.

121. The FTC has been doing this for both buyers and sellers in electronic commerce by preparing brochures and educational information for both groups on what to expect. See <http://www.ftc.gov> (last visited Oct. 24, 2001).

122. See *supra* note 32 and accompanying text.

Too ambitious an attempt, too comprehensive a goal, could result in a stalemate, especially when so many private interests are implicated and when basic underlying philosophies of legal systems and structures are involved.

CONCLUSION

We have opened the door to efficient and relatively cheap legal services for those who need dispute resolution by privatizing the work of courts. We have expanded the providers of legal services to encompass more than lawyers. Technology has furthered the reach of these services at an exponential rate—a rate faster than the creation of an underlying structure of support and control. While technology has created a new medium for legal services and dispute resolution, the old concepts and standards are not necessarily transferable in whole to the new space. While we might strive for “equivalence”¹²³ between dispute resolution off-line and on-line, we need to accept that there are additional factors, such as anonymity and lack of jurisdictional rules, that call for different solutions. ODR is part of the global means to build user confidence in e-commerce and ensure protection in cyberspace transactions. The providers of legal services and dispute resolution off-line and on-line in the end have similar goals—ensuring fairness, integrity, and quality to those who use their services.

123. *See supra* note 95.